No. 82-945

In the Supreme Court of the United States

OCTOBER TERM, 1982

SURE-TAN, INC. and SURAK LEATHER COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether an employer "constructively discharges" employees who are illegal aliens in violation of Section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA") by asking the Immigration and Naturalization Service to determine the employees' immigration status.

2. Whether the National Labor Relations Board can order backpay for illegal aliens who were deported to Mexico and therefore were unavailabile for work, thereby creating a fundamental conflict between the NLRA and the Immigration and Nationality Act.

3. Whether the imposition of an arbitrary six month backpay liability constitutes an improper punitive remedy violative of Section 10(c) of the NLRA.

4. Whether the NLRA requires that an offer of reinstatement to illegal aliens be held open for four years, be delivered in Mexico in a manner allowing verification of receipt, and be written in Spanish.

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OPINIONS BELOW

The unpublished Order and Judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 12, 1982, are found in the appendix to the Petition for a Writ of Certiorari in this case. (25a and 30a).[1]

The decision of The United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing and Suggestion for Rehearing *En Banc*, entered on May 5, 1982, is reported at 677 F.2d 584. (36a).

The opinion of The United States Court of Appeals for The Seventh Circuit, entered on February 24, 1982, as amended on February 26, 1982, is reported at 672 F.2d 592. (1a).

The decision and order of the National Labor Relations Board, entered on March 6, 1978, is reported at 234 N.L.R.B. 1187. (61a).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 12, 1982. (25a, 30a). The Petition for a Writ of Certiorari was filed on December 6, 1982 and granted on March 7, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

First Amendment to the Constitution of the United States

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

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[1] References herein to opinions and orders reproduced in the appendix to the Petition for a Writ of Certiorari will be denoted with the designation "a". References to the General Counsel's and the Respondent's Exhibits will be denoted with the designation "G.C.Ex." and "R.Ex.", respectively. References to the transcript will be denoted with the designation "Tr."

National Labor Relations Act

Section 7 of the National Labor Relations Act of 1947, 29 U.S.C. § 157, provides, in pertinent part, as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8(a)(1) and (3) of the National Labor Relations Act of 1947, 29 U.S.C. § 158(a)(1) and (3), provides, in pertinent part, as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .;
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Section 10(c) of the National Labor Relations Act of 1947, 29 U.S.C. § 160(c), provides, in pertinent part, as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act] . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Immigration and Nationality Act

Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), provides, in pertinent part, as follows:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States:
>
> . . .
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Section 241 of the Immigration and Nationality Act, 8 U.S.C. § 1251, provides, in pertinent part, that:

> (a) Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry . . ..

Section 275 of the Immigration and Nationality Act, 8 U.S.C. § 1325, provides, in pertinent part, that:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or

(3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $5,000, or both.

Section 287 of the Immigration and Nationality Act, 8 U.S.C. § 1357, provides, in pertinent part, that:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . .

National Labor Relations Board Casehandling Manual

Section 10528.15 of the National Labor Relations Board Casehandling Manual (Part III) provides as follows:

To avoid misunderstanding, the compliance officer should advise employers to make offers of reinstatement in writing and should likewise advise discriminatees to respond thereto in writing.

Section 10530.1 of the National Labor Relations Board Casehandling Manual (Part III) provides, in pertinent part, as follows:

(a) *Period Covered*: The period covered is that from the discriminatory loss or refusal of employment to a bona fide offer of reinstatement, but it does not include any period . . . (2) during which respondent proves the discriminatee was not available for work . . .

(b) *Backpay Period*: The period of time during which backpay accrues, usually between the date of discrimination and the date a bona fide offer of reinstatement is made.

Section 10612 of the National Labor Relations Board Casehandling Manual (Part III) provides as follows:

When a discriminatee becomes unavailable gross backpay does not accrue until discriminatee becomes available again . . ..

Proposed Immigration Reform and Control Act of 1983

S. 529, 98th Cong., 1st Sess., 129 CONG. REC. 6970 (daily ed. May 18, 1983), provides, in pertinent part, as follows:

Sec. 101(a)(1) Chapter 8 of title II is amended by inserting after section 274 (8 U.S.C. 1324) the following new section:

"Unlawful Employment of Aliens"

"Sec. 274A. (a)(1) It is unlawful for a person or other entity after the date of the enactment of this section—

"(A) to hire, or for consideration to recruit or refer, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in paragraph (4)) with respect to such employment.

* * *

(2) It is unlawful for a person or other entity who, after hiring an alien for employment subsequent to the date of the enactment of this Act and in accordance with paragraph (1), continues to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

* * *

(d)(1)(A) In the case of a person or entity with violates paragraph (1)(A) or (2) of subsection (a) and which—

(i) has not previously been determined (after opportunity for a hearing under paragraph (4)(A)) to have violated either such paragraph, the person or entity shall be subject to a civil penalty of $1,000 for each unauthorized alien with respect to which the violation occurred.

* * *

Sec. 101(a)(2)(A) Except as provided in subparagraph (B), the amendment made by paragraph (1) shall take effect on the date of the enactment of this Act.

(B)(i) Where the Attorney General has reason to believe that a person or entity may have violated subsection (a) of

section 274A of the Immigration and Nationality Act during the six-month period beginning on the first day of the first month beginning after the date of the enactment of this Act, the Attorney General shall notify such person or entity of such belief and shall not conduct any proceeding, nor impose any penalty, under such section on the basis of such alleged violation or violations.

(ii) Where the Attorney General has reason to believe that a person or entity may have violated subsection (a) of section 274A of the Immigration and Nationality Act during the subsequent six-month period, the Attorney General shall, in the first instance of such a violation (or violations) occurring during such period, provide a warning to the person or entity that such a violation or violations may have occurred and shall not conduct any proceeding, nor impose any penalty, under such section on the basis of such alleged violation or violations.

H.R. 1510, 98th Cong., 1st Sess. (1983), provides, in pertinent part, as follows:

SEC. 101(a)(1) Chapter 8 of title II is amended by inserting after section 274 (8 U.S.C. 1324) the following new section:

"Unlawful Employment of Aliens"

"SEC. 274A. (a)(1) It is unlawful for a person or other entity after the date of the enactment of this section to hire, or to recruit or refer for a fee or other consideration, for employment in the United States —

> "(A) an alien knowing the alien is an unauthorized alien (as defined in paragraph (4) with respect to such employment
>
> • • •
>
> "(2) It is unlawful for a person or other entity, after hiring an alien for employment subsequent to the date of the enactment of this section and in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.
>
> • • •

"(d)(1)(A) In the case of a person or entity which has not previously been cited under this subparagraph, if the Attorney General, based on evidence or information he deems persuasive, reasonably concludes that the person or entity has hired, or has recruited or referred for a fee or other consideration, for employment in the United States an unauthorized alien, the Attorney General may serve a citation on the person or entity containing a notification that the alien's employment is not authorized and a warning of the penalties and injunctive remedy set forth in this subsection.

"(B) In the case of a person or entity which has previously been cited under subparagraph (A), which is determined (after notice and opportunity for an administrative hearing under paragraph (4)(A)(i) to have violated paragraph (1)(A) or (2) of subsection (a), and which—

"(i) has not previously been subject to a civil penalty under this subparagraph, the person or entity shall be subject to a civil penalty of $1,000 for each unauthorized alien with respect to which the violation occurred

* * *

[Sec. 101(a)](2)(A) No citation, civil or criminal penalty, or injunction may be issued under section 274A of the Immigration and Nationality Act for the hiring, or recruiting or referring for a fee or other consideration, for employment of individuals occurring before the first day of the seventh month beginning after the date of the enactment of this Act.

STATEMENT OF THE CASE

Respondents Sure-Tan, Inc. and Surak Leather Company ("Sure-Tan") are two small leather processing and sales firms located in Chicago, Illinois. Both firms are owned by the same persons. Sure-Tan employed approximately 11 workers in 1976. A number of these employees were Mexican nationals. (2a).

In August, 1976, the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America (the "union") filed an election petition with the National Labor Relations Board (the "Board"). An election was held on December 10, 1976. The union won the election and was certified as the employees' collective bargaining representative on January 19, 1977. (2a).

After the union was certified, John Surak, one of the owners of Sure-Tan, by letter dated January 20, 1977, asked the Immigration and Naturalization Service ("INS") to determine the immigration status of eight of its employees. (G.C. Ex. 18; Tr. 26; 8-9a). In response to this letter, the INS checked its files to see if the individuals named were lawful permanent residents of the United States. On February 18, 1977, INS agents visited Sure-Tan and discovered that five of the eight employees listed in Surak's letter were residing illegally in the United States. These illegal aliens were arrested by INS agents. Each illegal alien was permitted by the INS to execute INS form I-274, whereby he acknowledged that he was a Mexican citizen illegally present in the United States. The illegal aliens were then placed aboard a bus that transported them back to the Mexican border. (9-10a).

The Board's General Counsel issued complaints against Sure-Tan on February 22, 1977 and March 23, 1977, alleging, *inter alia*, that Sure-Tan discriminatorily discharged the five illegal alien employees by causing their deportation in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act"). (66a). On March 29, 1977, Sure-Tan mailed letters offering reinstatement to the five illegal aliens. Each letter stated as follows:

> Sure-Tan, Inc. offers you full and complete reinstatement of your former job, provided only that your reemployment shall not subject Sure-Tan, Inc. to any violations of the United States immigration laws.
>
> Please report to work no later than May 1, 1977, if you accept this offer of re-employment.

(R.Ex. 1A-E; Tr. 13, 15; 20a).

The Administrative Law Judge concluded that Sure-Tan constructively discharged the five illegal aliens who were deported to Mexico in retaliation for their support for the union by requesting INS to investigate their immigration status. The ALJ's recommended order called for Sure-Tan to offer reinstatement to the employees, with the offer to remain open for six months. The ALJ reasoned that, since the alleged discriminatees were not available for employment after their return to Mexico, there should be no backpay award. (80-81a). A three member panel of the Board (Fanning, Jenkins, and Penello), in its decision and order of March 6, 1978, adopted the findings and conclusions of the ALJ, but modified the remedy, ordering that the illegal aliens be offered unconditional reinstatement with backpay. (63-64a).

The Board's General Counsel, on September 7, 1978, filed a "Motion for Clarification", requesting that the Board "make plain" what the Company's obligations were under the Board's order. (53a). The General Counsel observed that the order "appears to require reinstatement and backpay without regard to the discriminatee's illegal alien status . . ." (55a). Such result, the General Counsel noted, would be "contrary to national immigration policies and laws," because it would encourage the alleged discriminatees to reenter the country illegally. (55-56a).

A majority of the Board members (Fanning, Jenkins and Truesdale) issued an order on December 5, 1979 denying the General Counsel's Motion for Clarification and reaffirming the Board's earlier order. (44a). Members Penello and Murphy dissented. Member Penello would have limited the order "so as to require [Sure-Tan] to offer reinstatement only to discriminatees lawfully in the country". (45a). Member Murphy would have limited the backpay period "to the time from the date of discharge to the date of deportation," and would have also limited the time for acceptance of the Company's reinstatement offer to two weeks. (50-51a).

The court of appeals, in its decision of February 24, 1982, enforced the Board's order, subject to the following modifications: (1) reinstatement would be required only if the alleged discriminatees were lawfully entitled to be present and employed in this country when they offer themselves for reinstatement (22a); (2) in computing backpay, the discriminatees would be deemed unavailable for work during any period when they were not lawfully entitled to be present and employed in the United States (23a); (3) backpay would be placed in escrow for a period of one year (23a); and (4) the Board, "if it sees fit," could modify its order further by setting a minimum period of six months for which backpay would be awarded, regardless of the lawful unavailability of the discriminatees for work during the backpay period. (23-24a). The court of appeals also held that Sure-Tan's prior offer of reinstatement was defective because it did not hold the offers open for a period of four years, was not delivered in a manner al. ..ng verification of receipt, and was not written in Spanish. (22a).

In its judgment and order of July 12, 1982, the court of appeals eliminated the discretion it had previously given the Board to modify its order with respect to backpay, and required that each discriminatee be awarded a minimum of six months' backpay. (28a).

SUMMARY OF ARGUMENT

1. Sure-Tan did not "constructively discharge" employees who were illegal aliens in violation of Sections 8(a)(1) and (3) of the NLRA when it asked INS to investigate their immigration status. Their deportation was caused by their own illegal status. Sure-Tan should not be penalized for actions of the INS, where those actions were non-discretionary duties mandated by federal immigration laws.

Moreover, Sure-Tan's request of the INS to investigate the immigration status of its employees was protected by the first amendment right to petition the government. This Court recently recognized in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 51 U.S.L.W. 4396 (U.S. May 31, 1983) that the filing of a lawsuit, even for a retaliatory motive, is protected under the first amendment right to petition and is not an unlawful labor practice so long as the lawsuit has a reasonable basis. The right to petition the government extends to petitions to law enforcement agencies as well as to civil actions. The public interest in enforcing the immigration laws is just as strong as the interest in redressing civil wrongs. There is no question that Sure-Tan had a reasonable basis for requesting the INS to investigate the immigration status of its employees. The aliens in fact acknowledged their unlawful status and voluntarily returned to Mexico. Because Sure-Tan's petition to the INA was protected under the first amendment, it was not an unlawful constructive discharge, regardless of Sure-Tan's motives for petitioning the INS.

2. The court of appeals' backpay award undermines federal immigration laws. The court, in effect, treats the illegal aliens as if they had a right to remain in this country for an additional six months after their detection by the INS. Moreover, the court's remedy would reward the illegal aliens with six months' backpay for their violation of the immigration laws. The windfall backpay award would also provide the illegal aliens with an incentive to unlawfully reenter this country.

This Court has recognized that the Board is obligated to formulate remedies that comport with congressional objectives under other statutes. *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942). A backpay award that treats the illegal aliens as though they had a right to remain in this country unlawfully, rewards them for their violation of

federal immigration laws, and encourages their illegal reentry into this country creates an untenable conflict between the NLRA and the INA. Harmonization of the Board's remedial order with federal immigration laws requires the elimination of the backpay award.

3. The award of six months' backpay to the illegal aliens constitutes an improper punitive remedy violative of Section 10(c) of the NLRA. This Court has recognized that Board remedies must be remedial, not punitive. *Consolidated Edison Co. of New York, Inc.* v. *NLRB*, 305 U.S. 197, 236 (1938). A Board order is punitive where it is shown to be a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

The courts and the Board have established that the policies of the NLRA are effectuated by tolling backpay for periods when employees are not available for work, including periods where, as in the present case, the unavailability results from enforced absence from the country. The court's assessment of an arbitrary six month backpay liability on Sure-Tan, regardless of the unavailability of the illegal aliens for work, contrary to the Board's established procedure for computing backpay, represents a patent attempt to penalize Sure-Tan. It was improper for the court of appeals to preempt the legislative process by imposing judicially-created punitive sanctions on Sure-Tan, particularly where Congress, thus far, has chosen not to impose punitive sanctions on violators of the NLRA or on employers of illegal aliens.

4. The court of appeals' requirement that Sure-Tan's reinstatement offers remain open for four years places an unreasonable burden upon Sure-Tan and its present employees. The Board and the courts have repeatedly upheld reinstatement offers that remained open for less than the 30 day period afforded in Sure-Tan's reinstatement offers. It

would not serve the purposes of the NLRA to afford preferential treatment to those who violate federal immigration laws, particularly where it would likely result in the displacement of American workers. The requirements that Sure-Tan's reinstatement offers be written in Spanish and be sent in a manner allowing verification of receipt are also unwarranted departures from established Board precedent. The Board has not previously required reinstatement offers to be written in an employee's native language, or to be sent in a manner permitting verification of receipt. It is fundamentally unfair to impose such extraordinary "remedies" upon Sure-Tan.

ARGUMENT

I. SURE-TAN DID NOT CONSTRUCTIVELY DISCHARGE EMPLOYEES WHO WERE ILLEGAL ALIENS WHEN IT ASKED THE IMMIGRATION AND NATURALIZATION SERVICE TO DETERMINE THE EMPLOYEES' IMMIGRATION STATUS.

A. The Court of Appeals Misapplied The Constructive Discharge Doctrine.

The court of appeals concluded that Sure-Tan's inquiry to the Immigration and Naturalization Service ("INS") concerning the status of its Spanish-speaking employees was motivated by anti-union animus and "was the proximate cause of their departure." (12a). Using the doctrine of "constructive discharge" to brand Sure-Tan's inquiry to the INS as illegal, the court held that Sure-Tan violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act")[2] when it asked INS to investigate its employees. (15a)[3].

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[1] 29 U.S.C. § 151 *et seq.*

[2] Adopting the rationale of the Fifth Circuit in *NLRB* v. *Haberman Construction Co.*, 641 F.2d 351, 358 (5th Cir. 1981) (en banc), the Court

(footnote continued)

Contrary to the court of appeals' conclusion, the return of the illegal aliens to Mexico was "proximately caused" by their own illegal status. Sure-Tan's inquiry to the INS facilitated the Service's performance of its statutory obligations. The inquiry in no way mandated the actions of the INS. The INS has a legal duty to uphold the federal immigration laws—a duty that is not legally conditioned upon or modified by the actions of Sure-Tan.[4] It would be fundamentally unfair to hold Sure-Tan responsible for the actions of the INS, where those actions were non-discretionary duties mandated by federal immigration laws.[5]

(footnote continued)

of Appeals reasoned that:

> [T]wo elements are required to establish a constructive discharge. "First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted 'to encourage or discourage membership in any labor organization' within the meaning of Section 8(a)(3) of the Act." (12a).

The first element is absent in this case, because the employees' illegal presence in this country, not the actions of Sure-Tan, mandated their deportation.

[4] The duties of an INS officer include the interrogation of any alien or person believed to be an alien as to his right to remain in the United States. 8 U.S.C. § 1357. The immigration laws further call for deportation of any alien who, at the time of entry into the United States, was within one of the classes of excludable aliens (8 U.S.C. § 1251(a)(1)), including aliens who, like the illegal aliens in the present case, entered the United States unlawfully for the purpose of performing skilled or unskilled labor. 8 U.S.C. § 1182(a) (14). Immigration officers, upon taking office, pledge to "faithfully discharge the duties of the office. . . ." 5 U.S.C. § 3331.

[5] The INS has no discretion with respect to deportation of illegal aliens, regardless of whether the illegal aliens are reported to INS by their employer for improper motives.

> When an immigration statute makes an alien deportable as 8 U.S.C. § 1251(a)(2) (1976) does here, and INS enforcement

(footnote continued)

The court of appeals noted that it is of "considerable significance" that the alleged discriminatees were not deported by the INS, but rather voluntarily departed from this country after executing an INS form I-274. (9a, n. 11; 17a). Under this analysis, the court of appeals would hold Sure-Tan responsible for actions voluntarily undertaken by the illegal aliens. As noted by Judge Wood in his dissent to the court's order denying Sure-Tan's Petition for Rehearing:

> If we [had analyzed the case properly] I do not believe that the employers' notification to the Immigration and Naturalization Service would be construed as a "constructive discharge" so as to reward the illegal aliens for their illegal labor activities with possible reinstatement and back pay.
>
> * * *
>
> Rather than approve the majority's concocted remedy, I would, even if it took some stretching of the doctrine, simply consider the case moot when the illegal aliens "voluntarily" returned to their country ... As it is, this court has given proxies to illegal aliens to cast votes for American workers and now has given the illegal aliens some encouragement to come back, displace our own workers and be awarded a backpay bonus for doing it. At least the view of the majority may serve to inspire Congress to rescue us from this state of things which is our own judicial doing.

(38a).

Sure-Tan and American workers, however, should not have to await uncertain congressional action to redress this improper imposition of liability for actions of the INS. This Court should reverse the court of appeals' misapplication of the constructive discharge doctrine.

(footnote continued)

> officials seek deportation, the immigration judge is without power to terminate the proceedings on equitable, humanitarian, or other grounds not specified by the statute.

Rodriguez-Gonzalez v. *INS*, 640 F.2d 1139, 1142 (9th Cir. 1981).

B. Punishing Sure-Tan For Reporting A Suspected Violation Of The Immigration Laws Constitutes A Denial of Sure-Tan's Constitutional Right To Petition The Government.

The court of appeals' misuse of the constructive discharge doctrine is particularly alarming here, where it results in penalizing Sure-Tan for reporting a suspected violation of the law. The court of appeals and the Board have held, in effect, that once illegal alien workers engage in protected union activities, an employer may no longer inquire with the INS, even if it suspects that it might be employing illegal aliens. But an employer has no such duty of silence. There is, if anything, a duty of disclosure. As noted by the Ninth Circuit in *NLRB* v. *Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979): "An employer who suspects that an employee is in the United States without proper authority should report this information to the INS."[6]

Regardless of whether Sure-Tan had a duty to report its illegal alien employees to the INS, it nevertheless had a right to do so. The first amendment to the Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12* v. *Illinois State Bar Association*, 389

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[6] The public policy favoring reporting of violations of the law is reflected in the federal misprision of felony statute, 18 U.S.C. § 4, which subjects persons who fail to report a felony to a fine of up to $500 and a prison term of up to three years, or both. In addition, cases dealing with the tort of malicious prosecution consistently say that the tort is disfavored by the law, because public policy favors the prosecution of crime and demands that citizens who report such crimes be protected. *See, e.g., Hernan* v. *Revere Copper & Brass Inc.* 494 F.2d 705 (8th Cir.), *cert. denied*, 419 U.S. 867 (1974); *Frohlich* v. *Miles Laboratories, Inc.*, 316 F.2d 87 (9th Cir.), *cert. denied*, 375 U.S. 825 (1963).

U.S. 217, 222 (1967). It shares the "preferred place" accorded in our system of government to the first amendment freedoms, and has "a sanctity and a sanction not permitting dubious intrusions." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). As this Court recognized in *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1876), the right to petition is logically implicit in and fundamental to the very idea of a republican form of governance.

Nor is the right to petition conditioned upon the motives of the petitioner. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, *reh'g denied*, 365 U.S. 875 (1961), this Court held that railroad companies that pursued a variety of actions, including encouraging rigid enforcement of state laws against trucking companies for the purpose of undermining their competitive position, were shielded from antitrust liability by the first amendment right to petition. This Court observed that:

> The right of the people to inform their representatives in government of their desires with respect to the passage *or enforcement of laws* can not properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. (Emphasis added).

Id. at 139.

In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), this Court recognized that the right to petition goes beyond the right of access to courts, and extends "to all departments of the Government," including administrative agencies, regardless of the plaintiff's motive,[7] unless the action was a "mere sham" filed for harassment purposes.

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[7] In *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977), a taxpayer's complaint concerning the

(footnote continued)

The relationship between the first amendment right to petition and the NLRA was recently addressed by this Court in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 51 U.S. L.W. 4636 (U.S. May 31, 1983), wherein the Court held that "the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 4640. The Court observed that the first amendment right to petition the government is a fundamental right that is "too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Id.* at 4639, quoting *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds*, 498 F.2d 43 (3d Cir. 1974). Applying the "sham exception" doctrine of *California Motor Transport Co., supra*, this Court held that the first amendment right to petition shields a petitioner from liability under the NLRA, unless the petitioner's use of the legal processes lacks a "reasonable basis." *Id.* at 4639.

Applying this reasoning to the present case, Sure-Tan's request for enforcement of federal immigration laws is squarely within the protection of the first amendment right to petition the government. The right to petition an agency to enforce the law is as fundamental as the right to file a lawsuit. As this Court observed in *Bill Johnson's Restaurants*, the NLRA must be interpreted so as to safeguard "the substantial State interest in protecting the health and well being of its citizens." 51 U.S. L.W. at 4639. Nothing could be more essential to the public welfare than the untrammeled right of citizens to report a violation of the law.

(footnote continued)

activities of a government auditor was held to be protected by the first amendment right to petition. The court observed that it was "irrelevant to the applicability of the right to petition that its exercise might have the effect of causing professional injury to the official about whom complaints are made, or even that the complainer may be aware of or pleased by the prospect of such injury." *Id.* at 1343.

There is no question that Sure-Tan's request to the INA had a "reasonable basis," because the illegal aliens acknowledged their unlawful status and voluntarily returned to Mexico. The Board's finding of animus, which is not contested for purposes of this appeal, does not deprive Sure-Tan of its first amendment right to petition the government. *Id.* at 4640. Sure-Tan's petition to the INA, therefore, was not an unlawful constructive discharge.

As stated by Judge Wood in his dissent to the court's order denying Sure-Tan's Petition for Rehearing:

> The NLRB seems to use only its private knothole to view these issues and sees nothing except its own labor goals. I think this court instead of peering through the NLRB's knothole should look over the fence for a better understanding of the whole problem. (38a).

This Court's mandate in *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942), as well as its holding in *Bill Johnson's Restaurants, supra*, requires that the NLRA be interpreted in harmony with constitutionally protected rights. This harmonization requires "looking over the fence" and recognizing that one should not be penalized for reporting a violation of the law.

II. THE BACKPAY AWARD SUBVERTS FEDERAL IMMIGRATION LAWS.

A. The Court's Remedial Order Rewards Illegal Aliens For Violating The Immigration Laws.

The Board's remedial order, requiring unconditional reinstatement and backpay for the illegal aliens, created a fundamental conflict between the NLRA and the Immigration and Naturalization Act ("INA").[8] The court of appeals

[8] 8 U.S.C. § 1101 *et seq.*

did not remove, but partially alleviated this conflict by restricting reinstatement to aliens lawfully present in the country. (22-23a).

The court of appeals, like the Board, displayed remarkable indifference to federal immigration policies when it awarded a minimum of six months' backpay to each of the illegal aliens regardless of their lawful unavailability for work. By concluding that six months would be "the minimum [time] during which the discriminatees might reasonably have remained employed without apprehension by INS, but for the employer's unfair labor practice" (23a; 28-29a; 32a), the court treats the illegal aliens as though they had a right to remain in this country illegally for an additional six months after detection, when in fact they had no legal right to enter this country. Their unsanctioned entry was a crime.[9]

This Court observed in *Plyler* v. *Doe*, 102 S. Ct. 2382, 2396 (1982) that "those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation." It would seriously undermine federal immigration laws to treat those who enter this country by stealth in violation of the law as though they had a right to remain in this country illegally for an additional six months after their detection by the INS.

It is even more offensive that the court's remedy would reward the illegal aliens with six months' backpay for their violation of the immigration laws. The federal government clearly recognizes the inappropriateness of rewarding illegal aliens with the benefits of social welfare programs.[10] Simi-

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[9] Section 275 of the INA, 8 U.S.C. §1325, provides that any alien who unlawfully enters the United States commits a misdemeanor and for subsequent commission of such offense shall be guilty of a felony.

[10] Illegal aliens are excluded from the Food Stamp Program, 7 U.S.C. § 2015(f) and 7 C.F.R. § 273.4 (1982), the old age assistance, aid to

(footnote continued)

larly, states have excluded illegal aliens from unemployment compensation benefits.[11] It would be indeed anomalous to require a private employer to reward illegal aliens for tneir unlawful presence in this country, when federal and state governments have expressly declined to do so.[12]

(footnote continued)

families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs, 45 C.F.R. § 233.50 (1982), the Medicare Hospital Insurance Companies Program, 42 U.S.C. § 1395(i)-2 and 42 C.F.R. § 405.205(b)(1982), and the Medicaid Hospital Insurance Benefits for the Aged and Disabled Program, 42 U.S.C. § 1395(o) and 42 C.F.R. § 405.103(a)(4)(1982). *See Plyler* v. *Doe,* 102 S. Ct. at 2413 (Burger, C. J., dissenting). In addition, the Federal Unemployment Tax Act, 26 U.S.C. § 3304 *et seq.* subjects states to loss of federal funding if unemployment benefits are paid to illegal aliens. *See New Hampshire Department of Employment Security* v. *Marshall,* 616 F.2d 240, 241-42, *cert. denied and appeal dismissed,* 449 U.S. 806 (1980).

[11] Courts in several states have specifically held that illegal aliens are not "available for work" within the meaning of the state's unemployment compensation statute, and therefore are not eligible for unemployment benefits. *See, e.g. Alonso* v. *State,* 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (2d Dist. 1975); *Pinilla* v. *Board of Review.* 155 N.J. Super 307, 382 A.2d 921 (N.J. Super. Ct. App. Div. 1978).

[12] As observed by the court in *Alonso* v. *State,* 50 Cal. App.3d 242, 254, 123 Cal. Rptr. 536, 544 (2d Dist. 1975):

> To allow an illegal alien to collect unemployment benefits would reward him for his illegal entry into this country. In essence, his entry into this country is fraudulent, and as such he should not be allowed to profit from the illegal act.

In the present case, the illegal aliens should not be rewarded for their unlawful presence in this country with backpay, anymore than they should be rewarded with unemployment compensation.

B. The Backpay Award Encourages Illegal Immigration.

The backpay award also provides the illegal aliens with an incentive to reenter this country illegally. The court of appeals acknowledged that "[i]t obviously remains a possibility . . . that the discriminatees in this case might be motivated to reenter the United States unlawfully to claim reinstatement and backpay." (18a). The Board's General Counsel, in his Motion for Clarification, also recognized this danger, stating:

> As a practical matter, a discriminatee would be encouraged to return to the United States illegally, so that he could reap these job and monetary benefits as soon as possible, rather than postpone and perhaps give up these benefits entirely by delaying his return until that uncertain day, far in the future, when he *may* be able to enter the United States lawfully.

(55a).[13]

The court sidesteps this issue by surmising that an alien would be unlikely to attempt to illegally reenter the United States to pursue his remedy, and thereby "draw attention to his illegal alien status." (18a). The court further speculates that: "Indeed, the economic and social attractions which generally encourage illegal migration to this country are probably more compelling inducements than the special fruit of the Board's order might be in this case." (18a).

Contrary to the court of appeals' unsupported conclusion, the windfall backpay award would indeed provide a "compel-

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[13] Members Penello and Murphy, in their dissenting opinions to the Board's Order denying the Motion for Clarification, concurred with the General Counsel that the Board's conventional remedy of reinstatement and backpay would subvert federal immigration policy. As observed by member Penello, it is incumbent upon the Board "to take cognizance of other statutes and accommodate to them if we can." (48a).

ling inducement" to the aliens to reenter this country illegally. Such an inducement would subvert federal immigration objectives.

C. The Board's Remedial Order Must Comport With The Immigration Laws.

This Court has recognized that the Board is obligated to formulate remedies that comport with congressional objectives under other statutory schemes. In *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942), this Court faulted the Board for ordering reinstatement and backpay to striking seamen when the order ran contrary to a federal anti-mutiny statute, stating:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.[14]

Similarly, in the present case, it is not too much to demand of the Board and the court of appeals that they formulate remedies that comport with the objectives of the INA. Those objectives are clear—to protect American workers from an influx of foreign labor by imposing criminal sanctions on those who violate federal immigration laws.[15]

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[14] To the same effect, in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944), this Court instructed that, when an agency is "faced with overlapping and at times inconsistent policies embodied in other legislation . . . it cannot, without more, ignore the latter."

[15] As observed by the court in *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 761 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974), Section 212(a)(14) of the INA is written "so as to set up a presumption that

(footnote continued)

Harmonization of the remedial order with federal immigration laws and policies requires elimination of the backpay award to the illegal aliens. A backpay award that treats the illegal aliens as though they had a right to remain in this country, rewards them for their violation of the INA, and encourages them to illegally reenter this country creates an untenable conflict between the NLRA and the immigration laws.

III. THE AWARD OF SIX MONTHS' BACKPAY TO THE ILLEGAL ALIENS CONSTITUTES AN IMPROPER PUNITIVE REMEDY VIOLATIVE OF SECTION 10(c) OF THE ACT.

A. Board Remedies Must Be Remedial, Not Punitive.

Section 10(c) of the Act authorizes the Board, when it has found a party guilty of an unfair labor practice, to require the party to cease and desist from such practices "and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act]." 29 U.S.C. § 160(c).[16]

(footnote continued)

aliens should not be permitted to enter the United States for the purpose of performing labor because of the likely harmful impact of their admission on American workers." Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor may not be admitted unless the Secretary of Labor affirmatively determines and certifies that there are not sufficient workers available at the time and place the alien wishes to be employed and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed workers in the United States. 8. U.S.C. §1182(a)(14).

[16] The policies which the Board is directed to effectuate were outlined by Congress in Section 1 of the Act:

It is declared to be the policy of the United States to . . . mitigate

(footnote continued)

This Court defined the limits of the Board's remedial jurisdiction in *Consolidated Edison Co.*, v. *NLRB*, 305 U.S. 197, 235-36 (1938), stating:

> We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order. The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. [17]

A Board order is punitive where it is shown to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

B. The Backpay Award Is Patently Punitive.

The court of appeals acknowledged that the illegal aliens should be deemed unavailable for work and ineligible for

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(footnote continued)

> and eliminate . . . [obstructions to the free flow of commerce] . . . when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. §151.

[17] This Court reaffirmed in *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 11-12 (1940), that the Board's jurisdiction is remedial, not punitive. In that case, the Court denied enforcement of part of a Board order which required an employer to reimburse governmental agencies for wages paid under a work relief program to employees who had been discriminatorily discharged.

backpay "during any period when not lawfully entitled to be present and employed in the United States . . . ." (23a). Yet, the court ordered a minimum payment of six months' backpay, contrary to its own procedure for computing backpay, to assure that Sure-Tan was subjected to some monetary liability for its actions.

This exaction represents an impermissible attempt to achieve ends other than those which effectuate the purposes of the Act. The courts and the Board have long recognized that the policies of the Act are effectuated by tolling backpay for periods when discriminatees are unavailable for work.[18] Indeed, the Board, in its order denying the General Counsel's Motion for Clarification, stated that: "Discriminatees who are located but found to be unavailable for work (including unavailability because of enforced absence from the country) will have their backpay tolled accordingly." (41a).[19]

In *NLRB* v. *Local No. 2 of the United Association of Journeymen*, 360 F.2d 428, 434 (2d Cir. 1966), the court recognized that "[t]he right to backpay is not a punitory award for having been the victim of an unfair labor practice; it rests on the right to have had the work and presupposes the ability to do it." The illegal aliens in the present case had no legal right to work; their very presence in this country was unlawful. *See Ojeda-Vinales* v. *INS* , 523 F.2d 286 (2d Cir. 1975); *Pilapil* v. *INS*, 424 F.2d 6 (10th Cir.) *cert. denied* 400 U.S. 908 (1970)). They are therefore not entitled to backpay.

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[18] *See, e.g., Hale & Sons Construction*, 219 N.L.R.B. 1073, 1078-79 (1975) (employee in jail); *Gary Aircraft Corp.*, 210 N.L.R.B. 555, 557-58 (1974) (employee out of labor market); *Gifford-Hill & Co.*, 188 N.L.R.B. 337, 338 (1971) (employee in jail).

[19] The Board's Casehandling Manual (Part III), § 10612, provides that: "[w]hen a discriminatee becomes unavailable gross backpay does not accrue until discriminatee becomes available again . . . ."

In *Kroger Co.* v. *NLRB*, 401 F.2d 682, 688-89 (6th Cir. 1968), *cert. denied*, 395 U.S. 904 (1969), the Sixth Circuit denied enforcement to part of a Board order requiring the employer to make contributions to a voluntary profit sharing plan, where there was no basis for determining what the employees' contributions to the plan would have been in the absence of the employer's unfair labor practice. The court admonished: "We do not consider that a punitive order denominated as a remedy is called for, nor should Kroger employees be provided a 'windfall'. . . . Any effort to make such a determination would be pure speculation." *Id.* at 688-89. Similarly, in the present case, any determination of how long the illegal aliens would have remained working absent Sure-Tan's inquiry to the INS would be pure speculation, and an arbitrary award of backpay would present a windfall to the illegal aliens.

Where, as here, an arbitrary backpay award is assessed for a period that employees did not and could not work, contrary to the Board's established procedure for computing backpay, the award is patently punitive, having the same effect as a criminal fine. As observed by Judge Wood in his dissent to the Order denying Sure-Tan's Petition for Rehearing: "Much of the rationale [for the court's order] seems to be to punish the employer. Punishment of employers of illegal aliens, however, is for Congress, not for us." (38a).

Congress is presently struggling with the issue of sanctions against employers of illegal aliens in the proposed Immigration Reform and Control Act of 1983. It was improper for the court of appeals to undermine the legislative process by imposing judicially-created sanctions on Sure-Tan,[20] par-

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[20] As observed by Chief Justice Burger:

> [W]hen this Court rushes in to remedy what it perceives to be the failings of the political process, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy.

Plyler v. *Doe*, 102 S. Ct. at 2414 (Burger, C. J., dissenting).

ticularly where Congress thus far has not provided punitive sanctions against violators of the NLRA[21] or against employers of illegal aliens.[22]

IV. THE NATIONAL LABOR RELATIONS ACT DOES NOT REQUIRE SURE-TAN'S REINSTATEMENT OFFER TO BE LEFT OPEN FOR FOUR YEARS, TO BE WRITTEN IN SPANISH, AND TO BE SENT IN A MANNER ALLOWING VERIFICATION OF RECEIPT.

A. A Four Year Reinstatement Period Places An Unreasonable Burden on Sure-Tan and Its Present Employees.

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[21] Congress considered and rejected a bill that would have amended Section 303 of the NLRA to permit any person who suffers financial injury through a violation of Section 8(a)(3) or 8(b)(2) of the Act to sue in a U.S. district court to recover treble the damages sustained plus legal costs and attorneys' fees. H.R. 8110, 94th Cong., 1st Sess. (1975).

[22] The court's punitive six months' backpay award greatly exceeds the employer sanctions contemplated by either the House of Representatives or Senate versions of the proposed Immigration Reform and Control Act of 1983. H.R. 1510, 98th Cong., 1st Sess. (1983); S.529, 98th Cong., 1st. Sess., 129 CONG. REC. 6970 (daily ed. May 18, 1983). The House bill would authorize only a warning of possible penalties and injunctive relief for future violations against first offenders. The House bill authorizes a civil fine of $1,000 for each unauthorized alien employed for a second offense. H.R. 1510, §101 A(1). The Senate-passed bill imposes a civil penalty of $1,000 for each unauthorized alien employed for a first offense. S. 529, § 101(a)(1). Both bills provide a six-month grace period following the effective dates of the acts during which no action would be taken against an offending employer. H.R. 1510, § 101(a)(2); S.529, § 101(a)(2).

Sure-Tan's reinstatement offers were mailed to the deported aliens on March 29, 1977 and remained open until May 1, 1977. This 30 day reinstatement period was reasonable, and far exceeded the period required by the Board in numerous other cases. For instance, the Board approved a reinstatement offer that remained open for six days in *American Enterprises, Inc.*, 200 N.L.R.B. 114 (1972). In *Woodland Supermarket*, 240 N.L.R.B. 295 (1979), the Board held that eight days was a reasonable period to hold open reinstatement offers.[23]

In contrast, the court of appeals ordered Sure-Tan to leave its reinstatement offers open for four years after receipt of the offer. (31a).[24] The Board has never before required that a reinstatement offer be left open for such an extraordinary period of time. By requiring a four year reinstatement period, the court of appeals treats the illegal aliens with greater deference than it does employees who lawfully reside in this country. As with the backpay award, the four year reinstatement period serves to reward the illegal aliens for their violation of the immigration laws and to punish Sure-Tan for reporting them to the INS.

As observed by the court in *White Sulfur Springs Co.* v. *NLRB*, 316 F.2d 410, 415 (D.C. Cir. 1963), approving a reinstatement offer that remained open for only three days, "the employer certainly was entitled to know where it stood . . ." Similarly, in the present case, Sure-Tan and its present

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[23] *See also, NLRB* v. *W. C. McQuaide, Inc.*, 552 F.2d 519, 529-30 (3rd Cir. 1977) (less than two weeks held reasonable period of time to hold open reinstatement offers); *NLRB* v. *Betts Baking Co.*, 428 F.2d 156, 158 (10th Cir. 1970) (eight days held reasonable); *Southern Household Products Co.*, 203 N.L.R.B. 881, 882 (1973) (ten days held reasonable).

[24] If the reinstatement offers, which were mailed to the employees' last known address in Mexico, are not received by the offerees, the court-ordered reinstatement period could go on indefinitely.

employees are entitled to know where they stand with respect to reinstatement of the illegal aliens. The four year reinstatement period required by the court of appeals would place Sure-Tan and its present employees in a state of limbo for an unreasonable period of time.[25] The thirty day acceptance period afforded in Sure-Tan's reinstatement letter was fully adequate in light of established Board precedent.[26] It would not serve the purposes of the NLRA or the INA to afford preferential treatment to those who violate federal immigration laws, particularly where the aliens would likely displace the American workers presently working for Sure-Tan.

B. The Requirements That The Offers Be Written In Spanish and Be Sent By Means Allowing Verification of Receipt Are Unreasonable Departures From Established Board Precedent.

The Board's Casehandling Manual (Part III) § 10528.15, provides that: "To avoid misunderstanding, the compliance officer should advise employers to make offers of reinstatement in writing and should likewise advise the discriminatees to respond thereto in writing." Nowhere in the Casehandling Manual does the Board require that written reinstatement offers be written in an employee's native language or sent in a manner allowing verification of receipt.

Certainly an employer is entitled to communicate with its employees in English, the official language of this country.

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[25] The employees who replaced the illegal aliens are subject to dismissal if and when the alleged discriminatees become lawfully available for work. Thus, the four year reinstatement period exposes Sure-Tan's present employees to significant uncertainty with respect to seniority rights and pension benefits that might accrue during the extraordinary reinstatement period.

[26] Member Murphy, in her dissent to the Board's Order denying the General Counsel's Motion for Clarification, would have limited the time for acceptance of Sure-Tan's reinstatement offer to two weeks. (50-51a).

Courts have recognized that the government is not required to conduct its affairs and proceedings in languages other than English. See, e.g., *Carmona* v. *Sheffield*, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971), *aff'd*, 475 F.2d 738 (9th Cir. 1973).[27] It is unfair to require Sure-Tan to communicate with its employees in Spanish, when federal and state governments are not required to do so.[28]

In *General Iron Corp.*, 218 N.L.R.B. 770 (1975), the Board, reversing the ALJ, held that a reinstatement offer written in English was satisfactory, even though the employer knew that the discharged employees spoke only Spanish. The Board observed: "We are not aware of any case which has held that the language of the land is an inappropriate means for communicating with employees." *Id.* at 770. The Board also reversed the ALJ's holding that the reinstatement offers were invalid because they were not sent by registered mail, stating:

> [T]he novel idea that offers of reinstatement must be served by registered mail, return receipt requested, is not supported by precedent. In fact, the Board recently held that service of the General Counsel's brief by ordinary mail was sufficient even though the opposing party asserted without contradiction that it had never received the brief. (*citing Pacific Grinding Wheel Co., Inc.*, 216 N.L.R.B. 529 (1975)).

Id. at 771. Following the reasoning of *General Iron Corp.*, Sure Tan's reinstatement letters were fully adequate.

This Court has recognized that "[w]hen the Board so exercises the discretion given to it by Congress, it must

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[27] This Court recognized in *Fay* v. *New York*, 332 U.S. 261, 291 (1947), that a state has a right to require an "understanding of English" as a requirement for jurors.

[28] Congress has seen fit to require at least an elementary understanding of the English language as a condition to naturalization. 8 U.S.C. § 1423. Likewise, a federal juror must be able to "read, write, speak and understand the English language." 28 U.S.C. § 1861(2).

'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' " *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 (1965). Where the Board has reached different conclusions in prior cases, it is essential that "reasons for the decisions in and distinctions among these cases" be set forth to dispel any appearance of arbitrariness. *Id.* at 442. There is no reasonable basis for requiring Sure-Tan's reinstatement offers to be left open for four years, to be written in Spanish, and to be sent in a manner allowing verification of receipt, contrary to established Board precedent, in order to benefit individuals who violated federal immigration laws. Sure-Tan's reinstatement offers fully complied with the standards set forth in the Board's Casehandling Manual and in prior cases. Sure-Tan was entitled to rely upon these established standards, and its reinstatement offers should be upheld.

CONCLUSION

Sure-Tan's request to the INS to investigate the immigration status of its employees was not an unlawful constructive discharge. This case should therefore be remanded to the court of appeals with instructions to modify the decree of enforcement to exclude the requirement that the illegal aliens be reinstated with backpay. If this Court holds that Sure-Tan's request to the INS violated Section 8(a)(3) of the Act, the enforcement decree should be modified to exclude the backpay award in order to eliminate the fundamental conflict between the NLRA and the immigration laws, and

should be further modified to exclude the requirement that Sure-Tan send revised reinstatement offers to the aliens.

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